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8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT
11 SAN FRANCISCO DIVISION

12 VISA U.S.A. INC.,

13 Plaintiff/Counterclaim
14 Defendant,

15 v.

16 MARITZ INC., d/b/a MARITZ
LOYALTY MARKETING,

17 Defendant/Counterclaim
18 and Third-Party Plaintiff,

19 v.

20 CARLSON MARKETING GROUP, INC.

21 Third-Party Defendant.
22

CIVIL ACTION NO. C 07-5585 JSW

DECLARATION OF STEVE GALLANT

1 I, Steve Gallant, do hereby declare under penalty of perjury as follows:

2 1. I am Associate General Counsel at Maritz Inc. ("Maritz"). I live in St. Louis
3 County, Missouri, and work at Maritz's headquarters in Fenton, Missouri.

4 2. On or about April 23, 2007, I reviewed a letter dated April 20, 2007, from
5 Elizabeth L. Buse of Visa U.S.A. Inc. ("Visa") to Kelvin Taylor of Maritz (the "April 20 letter").
6 Ms. Buse advised Maritz in the April 20 letter that Visa was terminating the Master Services
7 Agreement dated April 17, 2006 (the "Agreement") effective May 20, 2007. A copy of the
8 April 20 letter is attached hereto as Exhibit 1.

9 3. I specifically recall noting as I reviewed the April 20 letter that Visa was not
10 terminating the Agreement based upon any claim that Maritz was in material breach or in default
11 under Section XII.A.1 or Section XII.A.2(a) of the Agreement. Had Visa attempted to terminate
12 for material breach, Maritz would have been entitled to notice and opportunity to cure under
13 Section XII.A.1 of the Agreement. (A copy of the pertinent provisions of the Agreement is
14 attached hereto as Exhibit 2.) Instead, according to the April 20 letter, Visa was terminating the
15 Agreement pursuant to Section XII.A.2(b) of the Agreement because Visa had decided to
16 implement the Visa Extras Rewards Program through a different vendor.

17 4. Since Visa was not terminating the Agreement based upon any alleged default or
18 material breach but instead under Section XII.A.2(b), I considered Visa's termination to be a
19 termination for convenience.

20 5. Since Visa was terminating the Agreement for convenience, I reviewed the portion
21 of the Agreement pertaining to Maritz's right to be compensated following termination. The
22 Agreement provided for Visa to pay Maritz for, among other things, completed Milestones and
23 also for partially completed Milestones on a pro-rata basis based on percentage of completion.

24 6. I considered Ms. Buse's "reservation of rights" language in her April 20 letter to
25 be simply standard language to preserve Visa's ability to object to the amount that Visa would
26 have to pay to Maritz in light of Visa's "for convenience" termination.

27 7. In response to the April 20 letter, Maritz's Kelvin Taylor sent a letter to Visa dated
28 May 7, 2007 (the "May 7 letter") in which Maritz advised Visa that, in accordance with

1 Section XII.A.2(b) of the Agreement, the amount due and owing to Maritz from Visa was
2 approximately \$5.2 million. A copy of the May 7 letter is attached hereto as Exhibit 3.

3 8. Maritz's May 7 letter contains a very brief reservation of rights sentence. Maritz
4 anticipated, quite simply, that Visa might attempt to pare down the \$5.2 million that Visa owed,
5 and Maritz therefore was simply reciprocally reserving its rights to the extent it might be relevant
6 to do so. I thought that Visa might disagree, for example, with Maritz's percentage completion
7 estimates for partially completed Milestones and thus attempt to reduce the amount that Visa
8 would have to pay Maritz.

9 9. Ms. Buse subsequently sent letters to Mr. Taylor dated June 5 and July 2, 2007 in
10 which Ms. Buse again mentioned Visa's reservation of rights. As of those dates, I had no reason
11 to believe that Visa was claiming that Maritz should pay it any money, much less the tens of
12 millions of dollars that Mr. Thompson subsequently revealed on July 23, 2007. To my
13 knowledge, no one from Visa had made any such claims to Maritz, and I am confident I would
14 have been told had such claims been made. Such claims would also have been completely
15 inconsistent with Visa's termination of the Agreement which was based on convenience rather
16 than default and as such I considered the "reservation of rights" language to be redundant to that
17 of the April 20 letter.

18 10. On Monday, June 18, 2007, Mark Peterman of Maritz told me that he had spoken
19 with David Shepard of Visa on Friday, June 15, 2007. According to Mr. Peterman, Mr. Shepard,
20 Tad Fordyce and Tim Attinger of Visa were available to meet with Maritz in mid-July 2007 to
21 discuss Maritz's invoices, which was consistent with what I believed we were going to discuss
22 with Visa. (I understood that Mssrs. Fordyce, Attinger and Shepard all had leading roles for Visa
23 in connection with the Rewards Program project, as did Mr. Peterman for Maritz.) To my
24 knowledge no one from Visa told Mr. Peterman that Visa considered Maritz to be in default, or
25 that Visa was looking for any payment from Maritz, much less that Visa believed that Maritz
26 owed Visa tens of millions of dollars. If Visa had so informed Mr. Peterman, I would have been
27 informed.

1 11. A copy of Mr. Peterman's June 18, 2007 email reflecting his June 15, 2007
2 discussion with Mr. Shepard of Visa is attached hereto as Exhibit 4.

3 12. On July 2, 2007, Ms. Buse of Visa sent a letter to Mr. Taylor of Maritz (the "July 2
4 letter") in which she proposed a three stage process to negotiate a resolution. Ms. Buse suggested
5 that the parties first engage in direct negotiations; then a non-binding mediation if the
6 negotiations were unsuccessful; and an arbitration if the mediation was not successful. She
7 suggested in her July 2 letter that Maritz's legal counsel contact Visa's counsel to establish a
8 mutually acceptable procedure.

9 13. As of July 2, 2007, my belief and understanding was that we were going to
10 negotiate how much of the \$5.2 million referenced in Mr. Taylor's May 7 letter Maritz was
11 entitled to receive from Visa pursuant to the termination for convenience portion of the
12 Agreement. To my knowledge, as of July 2, 2007, Visa had not told Maritz that Visa considered
13 Maritz to be in default, or that Visa expected Maritz to pay anything, much less that Visa would
14 claim that Maritz owed tens of millions of dollars.

15 14. Based upon Ms. Buse's July 2 letter, I contacted Visa's counsel, Rod Thompson.

16 15. I had several conversations or communications with Mr. Thompson between
17 Maritz's receipt of the July 2 letter and July 9, 2007. At no time during any of these discussions
18 or communications did Mr. Thompson say or indicate that Visa was claiming that Maritz was in
19 default, or that Visa would claim that Maritz should pay Visa anything, much less that Visa was
20 owed tens of millions of dollars. Nothing that Mr. Thompson said to me suggested that Visa had
21 or was making any claim for money from Maritz. Based on our conversations, I was led to
22 believe that we were trying to devise a process for determining the amount of compensation that
23 Maritz was owed by Visa under the Agreement in light of Visa's termination for convenience.

24 16. I believe it was reasonable for me to expect that, if Visa intended to make a default
25 claim exceeding the amount of Maritz's invoices by ten times or more and to resolve that claim in
26 binding arbitration, Mr. Thompson would tell me. He did not, nor to my knowledge did Visa
27 convey any such information to anyone else at Maritz.

28

1 17. I also knew that under Section XXII.A. of the Agreement, the parties were
2 obligated to act in good faith and reasonably in resolving any disputes that arose under the
3 Agreement (See Exhibit 2). More specifically, Section XXII.A. of the Agreement provides:

4 **“DISPUTE RESOLUTION.**

5 **A. Good Faith.** The Parties shall act in good faith and reasonably in
6 interpreting this Agreement and the Related Agreements and resolving any
disputes that arise thereunder.”

7 If Visa was claiming that Maritz owed it tens of millions of dollars, then Visa/
8 Mr. Thompson should have disclosed this information before inducing me to agree to an
9 arbitration.

10 18. On July 9, 2007, Mr. Thompson sent me a letter (the “July 9 letter”) which
11 contained, among other things, an agreement to arbitrate. I signed and returned the July 9 letter
12 the next day. At no time before I signed the July 9 letter did Mr. Thompson ever say or indicate
13 to me that Visa considered Maritz to be in default, or that Visa expected Maritz to pay Visa
14 anything, much less that Visa was or would be seeking tens of millions of dollars from Maritz.

15 19. Under these circumstances, I was willing to agree to a three-step approach to try to
16 resolve things, i.e., a business negotiation, followed by a mediation if the meeting were
17 unsuccessful, followed by an arbitration if the mediation were unsuccessful. I never would have
18 agreed to arbitrate in the July 9 letter had I known that Visa was claiming that Maritz had
19 defaulted and that Visa was owed tens of millions of dollars in alleged damages.

20 20. The agreement to arbitrate in the July 9 letter provides that the arbitration “will
21 allow for only limited discovery” and that the hearing must be commenced within 90 days after
22 the mediation process ends. I would never have agreed to such an expedited schedule or to
23 limited discovery had Visa revealed that it would be seeking tens of millions of dollars from
24 Maritz. I would not have been willing to arbitrate under these conditions a default claim against
25 Maritz for tens of millions of dollars (which is a vastly different claim than one in which Maritz
26 was seeking to recover \$5 million in termination for convenience compensation).

1 21. My objection all along has been only with the agreement to arbitrate. Although
2 Visa and Mr. Thompson had misled Maritz and me, and their conduct raised serious questions in
3 my mind as to whether either negotiations or mediation would be successful, Maritz and I
4 nonetheless were still willing to meet with Visa and also to attempt to mediate our differences,
5 and Maritz in fact did meet with Visa and did participate in the mediation. However, we were not
6 and are not willing to give up (among other things) Maritz's right to a jury trial, Maritz's right to
7 conduct discovery that is critical to getting to the bottom of Visa's belatedly-revealed claims for
8 tens of millions of dollars, or to limit Maritz's possible rights on appeal.

9 22. Mr. Thompson did not reveal Visa's claims to me until approximately two weeks
10 after he sent his July 9 letter containing the agreement to arbitrate.

11 23. More specifically, on Monday, July 23, 2007, I returned to the office after having
12 been on vacation. That morning, I read the proposed "Alternative Dispute Resolution Protocol"
13 that Mr. Thompson had sent me by letter dated July 19, 2007. The proposed Protocol stated that
14 "Each Party claims the other should make a payment to resolve the dispute." My immediate
15 reaction was that the sentence was probably a mistake that resulted from a carry-over from a
16 "form" protocol that Mr. Thompson or Visa had used in the past. Shortly thereafter, I met with
17 Mark Peterman and Stu Vincent of Maritz, both of whom had been intimately involved in the
18 Visa project. The purpose of the meeting with Mr. Peterman and Mr. Vincent (which had been
19 previously scheduled) was to prepare for a meeting that had been scheduled in St. Louis with Visa
20 for the next day, July 24, 2007, at which we were going to discuss the \$5.2 million that Visa owed
21 as referenced in the May 7 letter. I showed Msrs. Peterman and Vincent the sentence in the
22 proposed Protocol and asked them if they knew of any claim by Visa that Maritz should pay Visa
23 money to resolve the dispute. They told me that they did not. In fact, they told me that Mr.
24 Peterman had spoken with Mr. Fordyce the previous Friday, July 20, 2007, and had discussed
25 with him how the negotiations on July 24 would proceed, and that Fordyce had confirmed
26 Peterman's understanding and expectation that the purpose of the July 24 meeting was to cover
27 Maritz's invoices. Mr. Fordyce had said nothing, according to Mr. Peterman, about Visa having
28 any claim that Maritz should pay money.

1 24. I quickly followed up and called Mr. Thompson. I told him that I had noticed the
2 “Each party claims the other should make a payment” language in the proposed Protocol and told
3 him that I assumed it was a mistake or a carry-over from another form. He told me it was not a
4 mistake and then revealed, for the first time, that Visa was claiming that Maritz owed Visa tens of
5 millions of dollars.

6 25. I essentially told him that this was news to me and that I was very surprised.
7 Mr. Thompson then claimed that our business people had known about this for many months. I
8 knew his statement was untrue, since Mr. Peterman and Mr. Vincent of Maritz had told me less
9 than two hours earlier that they did not know that Visa was claiming that Maritz should pay Visa
10 anything, much less that Maritz supposedly owed Visa tens of millions of dollars.

11 26. When Mr. Thompson revealed that Visa was claiming that Maritz owed Visa tens
12 of millions of dollars, I was incensed and immediately felt as if we (i.e., Maritz and I) had been
13 duped, deceived and lied to. Although I may have indicated at the time that I was not “accusing”
14 Mr. Thompson of certain things, that was largely because accusing him at that point of fraud and
15 improper conduct would not have accomplished anything and probably would have led to some
16 very harsh and uncomplimentary things being said. Moreover, I wanted to try to keep the
17 discussion on a professional level and did not want my emotions to get the better of me. He had
18 clearly deceived me, but I did not want his deceitful conduct to result in my stooping to a similar
19 level.

20 27. Pursuant to my initial reaction, I told him that I saw no reason for Visa to come to
21 St. Louis on July 24 for the meeting because we (Maritz) did not have any information about
22 Visa’s claim and the trip therefore would be a waste of time. Upon further reflection, I called
23 Mr. Thompson back and told him that they could come on out. He told me that they had decided
24 not to come.

25 28. Mr. Thompson clearly knew we were surprised by Visa’s claim. He sent me an
26 email on July 23 stating that “in light of Maritz [sic] surprise about Visa’s claim for damages, it
27 makes sense not to rush into a meeting without an agreement on the details of the process.” A
28 copy of this email is attached hereto as Exhibit 5.